UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 5

HBC MANAGEMENT SERVICES, INC.

and Case 5-CA-219166

UNITED SECURITY & POLICE
OFFICERS OF AMERICA (USPOA)

PROPOSED FINDINGS OF FACT, PROPOSED CONCLUSIONS OF LAW, AND LEGAL BRIEF

Respondent, HBC Management Services, Inc. ("HBC"), by and through its undersigned attorney, hereby proposes the following Findings of Fact and Conclusions of Law, and otherwise advances arguments as set forth in the Legal Brief attached hereto, in the above-captioned matter as follows:

Proposed Findings of Fact

1. HBC is a corporation which has been engaged in providing security services as a contractor to the United States Department of the Navy, with respect to the Washington Navy Yard – Naval Sea Systems Command (NAVSEA).

2. At all relevant times, HBC has recognized United Security & Police Officers of America ("USPOA") as the exclusive collective-bargaining representative of the following unit of HBC's employees: All full-time and regular part-time security

officers employed by HBC at the Washington Navy Yard NAVSEA and Military Sealift Command.

3. Members of the above-described collective bargaining unit are each employed by HBC as armed security guards at the Washington Navy Yard, which is a federal installation located within Washington, D.C.

4. HBC's recognition of USPOA as these employees' exclusive collective-bargaining representative has been embodied in a Collective Bargaining Agreement between HBC and USPOA, effective January 9, 2017 to January 31, 2020.

5. Appendix A of the Collective Bargaining Agreement provided that the parties had agreed to bargain over potential increased rates for Wages, Health and Welfare, and Pension that would go into effect on February 1, 2018 and February 1, 2019.

6. These effective dates of February 1, 2018 and February 1, 2019 had been purposefully selected by the parties to coincide with the beginning of the "option year" periods contained within HBC's contract with the federal government.

7. HBC's contract with the Department of the Navy is structured so that it had been effective for one-year terms running from February 1st of one year to January 31st of the following year, with an initial base contract period of one year, and the Department of the Navy having the ability to extend the contract for multiple one-year periods through exercise of an option.

8. To the extent that HBC and USPOA could reach a written agreement to prospectively increase the unit members' wages or other compensation sufficiently in advance of the government's exercise of any given option year, HBC generally had the ability to submit that agreement to the government and obtain reimbursement for the increased compensation, effective at the start of the option year.

9. HBC's ability to successfully receive reimbursement from the federal government for any prospective increase in its employees' compensation was generally limited by a need to timely submit a written agreement with USPOA in advance of the government's exercise of any given option year, pursuant not only to the terms of HBC's contract with the Department of the Navy, but also pursuant to the Federal Acquisition Regulations which are generally applicable to all federal contracts of this type.

10. Pursuant to the Federal Acquisition Regulations which are generally applicable to all federal contracts of this type, HBC might have been able to request an equitable adjustment to provide reimbursement for increased wages from the federal government outside of the exercise of an option year, but HBC would not necessarily have been entitled to such an adjustment and it could not rely upon such an adjustment being granted.

11. Pursuant to federal law, agreements between federal contractors and their employees' collective-bargaining agents cannot be made contingent upon government

approval; therefore, contractors such as HBC are disincentivized from offering increases in compensation other than those linked to and timely submitted prior to the exercise of an option year or the award of a new contract with the government.

12. On December 8, 2017, Ishun Richards sent an email to HBC's management representatives, requesting to bargain on several subjects, including a potential increase in Wages pursuant to Appendix A of the applicable CBA.

13. Mr. Richards had been USPOA's National Vice President since August 2016 and in that position had negotiated approximately twenty-five (25) contracts or economic re-openers on behalf of USPOA, most with federal government or D.C. government contractors.

14. This December 8th email stated that "[t]he Union is aware of the need to complete negotiations by December 31, 2017 per the Contracting Officer."

15. Mr. Richards believed that negotiations had to be completed by December 31st because he had allegedly been told the prior year that the Contracting Officer, who was responsible for HBC's federal contract for the Washington Navy Yard, had wanted a CBA completed by December 31, 2016.

16. On December 13, 2017, Cliffton Metaxa, HBC's Director of Operations, responded to Mr. Richards's email, asking Mr. Richards to "please send me your economic and language proposal ASAP. We need to focus on getting this done before the upcoming option year."

17. By virtue of his experience with this bargaining unit and the specific dates used within Appendix A of the CBA, Mr. Richards was aware in December 2017 that the option year for HBC's contract with the Department of the Navy would begin on February 1, 2018.

18. By virtue of his experience with this bargaining unit and the specific dates used within Appendix A of the CBA, and negotiating with federal contractors generally, Mr. Richards was aware in December 2017 that the option year for HBC's contract with the Department of the Navy would be exercised by the government sometime prior to February 1, 2018.

19. By virtue of his experience with this bargaining unit and the specific dates used within Appendix A of the CBA, and negotiating with federal contractors generally, Mr. Richards was aware in December 2017 that HBC would be much more likely to receive reimbursement from the federal government for any Wages increase that might go into effect on February 1st if a signed agreement between HBC and USPOA were completed and submitted to the Contracting Officer prior to the government's exercise of the option year.

20. By virtue of his experience with this bargaining unit and the specific dates used within Appendix A of the CBA, and negotiating with federal contractors generally, Mr. Richards was aware in December 2017 that if HBC could not be assured of being able to timely submit a signed agreement between HBC and USPOA such that

HBC would receive reimbursement from the federal government for any Wages increase that might go into effect on February 1st, HBC's negotiating position on that potential Wages increase would likely be very different than if HBC reasonably believed it would receive such reimbursement.

21. There was no contact between HBC and USPOA after Mr. Metaxa's December 13th email for over five weeks, until 6:50 p.m. on Friday, January 19, 2018, when Mr. Richards sent an email to HBC's management representatives with a proposal on potential increased Wages and other matters.

22. USPOA's proposal, which was attached to the January 19th email, erroneously identified February 28, 2018 as the effective date for the proposed increase in Wages; it also listed potential effective dates of February 28, 2019 and February 28, 2020, but with no proposed figures for those additional dates.

23. Prior to USPOA's second email, on or about January 17, 2018, the Contracting Officer for the Washington Navy Yard had presented HBC with a signed Modification of Contract, the stated purpose of which was to exercise an option year from February 1, 2018 through January 31, 2019 in HBC's contract with the Department of the Navy.

24. Having received no proposal from USPOA or any communication at all from USPOA since Mr. Richards's initial email of December 8th, not being aware that any proposal would be forthcoming, and having no basis for delay with respect to the

government, Bradley Cooper, HBC's Chief Operating Officer, countersigned the Modification of Contract on January 18, 2018.

25. On the morning of Monday, January 22, 2018, Mr. Metaxa sent an email to Mr. Cooper, seeking advice on how to respond to USPOA's proposal, noting that USPOA had already "missed the deadline for a wage adjustment for this option year."

26. Mr. Cooper responded to Mr. Metaxa the same morning, advising that "[w]e are past the deadline to incorporate any increases for the next option period, even if we wanted to. We should continue discussions, but any economic change will not take effect until 2019." Mr. Cooper instructed Mr. Metaxa to advise Mr. Richards that HBC was in receipt of the proposal and would respond shortly, and Mr. Cooper internally sought out updated information on DC-area wages to assist in the further-contemplated negotiations.

27. On January 23, 2018, Mr. Metaxa sent an email to Mr. Richards advising that HBC was "in receipt of this email and will respond shortly." Mr. Metaxa's employment with HBC subsequently ended on or about January 31, 2018.

28. On February 6, 2018, Mr. Richards sent an email to HBC's representatives, including Mr. Cooper, advising that the "Union is still awaiting a counter to the last proposal."

29. That same day, Mr. Cooper responded by email to Mr. Richards to advise that Mr. Metaxa had left HBC's employment but that the company "will be responding

to your proposal."

30. Mr. Cooper's intent, as contemporaneously documented in an email the same day to HBC's new Project Manager for the Washington Navy Yard, was to get organized and potentially to involve the company's outside counsel as a representative for continuing negotiations with USPOA.

31. Mr. Cooper believed, at that time, that Mr. Richards was aware that USPOA's proposal was untimely with respect to the government's exercise of HBC's option year, that the company would not be offering any retroactive wage increase for February 1, 2018, and that continuing negotiations would be focused on a potential wage increase for the following option year on February 1, 2019.

32. HBC did not identify any specific time period for its anticipated response and at no point did USPOA request that HBC respond within some specific time frame.

33. There was no relevant contact between HBC and USPOA after February 6, 2018, until approximately March 6, 2018, when USPOA made HBC aware of the filing of a Board Charge against the company for alleged bad-faith bargaining, though the Charge was later re-filed on April 25, 2018 due to a paperwork error on USPOA's part.

34. Mr. Richards testified that his delay of over five weeks in providing a proposal to HBC was, at least in part, because he believed that HBC required comparison data to support any potential increase in compensation, and that gathering such evidence was difficult for him.

35. Mr. Richards did not provide any other evidence to support this excuse for his delay, and none of his communications with HBC on this matter provide, discuss, or even mention any such comparison data.

36. Pursuant to federal law, the only requirement to which comparison data may be relevant is that increases in compensation must be the result of arm's length negotiations, and may not be substantially at variance with those which prevail for services of a similar character in the locality.

37. HBC does welcome the provision of supporting data from unions it bargains with, so as to help justify increases in compensation to the government, but HBC doesn't require that any specific information of this type is a prerequisite to reaching an agreement with a collective-bargaining agent such as USPOA for increased compensation.

38. HBC also does not require that comparison data must or should be provided before HBC will receive or consider a proposal for increased compensation, as Mr. Richards implied through his testimony.

39. HBC played no part whatsoever in causing the delay that led to USPOA's initial proposal not being provided until after the government and HBC had already executed a Modification of Contract for the option year running from February 1, 2018 through January 31, 2019.

40. At no point did HBC refuse to meet with USPOA, nor did it end

bargaining or refuse to consider the union's proposal.

41. HBC did not engage in regressive bargaining, purposeful delaying tactics, unreasonable bargaining demands, unilateral changes in mandatory subjects of bargaining, efforts to bypass the union, failure to designate an agent with sufficient bargaining authority, withdrawal of already agreed-upon provisions, or arbitrary scheduling of meetings.

Proposed Conclusions of Law

1. HBC is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

2. USPOA is a labor organization within the meaning of Section 2(5) of the Act.

3. The National Labor Relations Board, by and through its Administrative Law Judge, has jurisdiction over the parties and of the subject matter of the proceeding.

4. None of HBC's conduct supports a finding that it refused to bargain collectively or in good faith with the exclusive collective-bargaining representative of its employees, and therefore no violation of Section 8(a)(1) or Section 8(a)(5) of the Act has occurred on that basis.

5. To the extent that HBC did not substantively respond to USPOA's proposal between January 18, 2018 and March 6, 2018, or while this matter was pending

before the Board after March 6, 2018, in the context of HBC's overall conduct it has not failed to bargain collectively or in good faith with the exclusive collective-bargaining representative of its employees, and therefore no violation of Section 8(a)(1) or Section 8(a)(5) of the Act has occurred on that basis.

6. Alternatively, to the extent that HBC's lack of a response during the cited period, by itself, could support a finding that HBC violated its statutory obligation to bargain, the union's own bad faith in failing to bargain between December 8, 2017 and January 19, 2018 precludes a finding of bad-faith bargaining on the part of HBC, and therefore no violation of Section 8(a)(1) or Section 8(a)(5) of the Act has occurred on that basis.

Legal Brief

I. The complained-of delay on HBC's part, by itself, is insufficient to find that there was a failure or refusal to bargain in good faith.

This case against HBC rests entirely on the company's delay in providing a counter-proposal, which allegedly lasted from the evening of January 19, 2018 through the initial filing of a Board Charge on or about March 6, 2018 – a period of roughly 6 ½ weeks. "It is necessary to scrutinize an employer's overall conduct to determine whether it has bargained in good faith." Health Care Services Group, Inc., 331 NLRB No. 49 (2000) (citing Atlanta Hilton & Tower, 271 NLRB 1600 (1984)). In reported

decisions, when a delay in making proposals or responding has led to a finding that the NLRA was violated, it is always in the context of other evidence, and usually significant other evidence, against the employer. See, e.g., Health Care Services Group, Inc., 331 NLRB No. 49 (2000); Bryant & Stratton Business Institute, 321 NLRB No. 146 (1996); Elite Marine Service, Ltd., 306 NLRB No. 145 (1992).

By way of example, in Health Care Services Group the Administrative Law Judge determined that a 6 ½-month delay in making proposals could be indicative of a lack of good faith; this must also mean that such a delay, by itself, should not necessarily be determinative of a lack of good faith. In any event, that case also involved an employer who withdrew from tentative agreements, failed to provide authority to a bargaining representative, failed to show up at several negotiating sessions, and engaged in multiple instances of regressive bargaining on wage rates.

In Byrant & Stratton Business Institute, a similar delay led to a finding of bad faith because of substantial other evidence: the employer at times was unprepared for meetings, it sometimes maintained inconsistent bargaining positions, it submitted a disingenuous proposal on seniority, it asserted that it recognized no concept of promotion but included reference to promotions in its management rights proposal, it did not timely provide the union with relevant information, it unilaterally changed several terms and conditions of employment, and it frequently referred to its belief that the union lacked employee support for the union's demands.

In Elite Marine Service, bad faith was found where a union had made repeated efforts to meet with an employer to negotiate a new contract, over a period of 5 ½ months, and the employer provided no plausible grounds why it had refused to meet with the union; there were also associated unfair labor practices in that the employer threatened its employees with closing its business to discourage support for the union, it told employees it would only hire people opposed to the union, it unlawfully interrogated its employees as to their support for the union, and it discharged three employees because of their support for the union.

None of these other indicia of bad faith can be found in this case. HBC twice acknowledged receipt of USPOA's proposal and communicated that it would be responding, and HBC also began its internal discussions and review, as it typically does in the case of wage re-openers, to determine its position. There are no allegations and there is no evidence that HBC engaged in regressive bargaining, purposeful delaying tactics, unreasonable bargaining demands, unilateral changes in mandatory subjects of bargaining, efforts to bypass the union, failure to designate an agent with sufficient bargaining authority, withdrawal of already agreed-upon provisions, or arbitrary scheduling of meetings. There are no issues here with respect to HBC's recognition of USPOA, nor have there been any alleged unilateral changes or unfair labor practices.

There is no evidence or indication that this was anything other than a standard mid-term wage re-opener for HBC, except that despite the company's request for a

proposal "ASAP", it did not receive any proposal from USPOA until after the company's opportunity to seek reimbursement from the government had passed, and the company then reasonably assumed that further negotiations would instead be focused on the following year's option period, to be effective on February 1st of 2019 instead of 2018. HBC's representatives had dealt with USPOA and Mr. Richards the year prior and also in the context of another federal contract, and Mr. Cooper reasonably believed that Mr. Richards had enough experience and knowledge to understand that HBC would not have time to consider and respond to a proposal initially provided so close to the start of the option year (even if the option had not already been exercised), and that HBC would have no incentive to offer or agree to a wage increase for which it was unlikely to be reimbursed by the federal government. In light of HBC wanting to be diligent in its response, believing that the next relevant date for purposes of continuing negotiations was many months away in 2019, and given the lack of any other communication from USPOA to suggest that HBC's response was expected or allegedly due by a certain date, HBC has illustrated the "plausible grounds" that were lacking in Elite Marine Service.

II. USPOA's own delay in providing an initial proposal, which was the sole cause of the parties' inability to reach agreement on increased wages in a timely manner, constitutes bad faith bargaining on the union's part, thereby precluding a finding of bad-faith bargaining on the part of HBC.

What also sets this particular case apart from most reported decisions involving

an alleged delay in making proposals or responding, is that there was also a delay on USPOA's part, with much greater significance to, and impact upon, the parties' ability to reach agreement on any potential increase in wages. The Board has held that a party's own bad faith during bargaining may preclude a finding of unlawful bad-faith bargaining by the other party. Hotel Employees and Restaurant Employees, Local 2, 340 NLRB No. 52 (2003) (citing New Brunswick General Sheet Metal Works, 326 NLRB 915 (1998); Louisiana Dock Co., 293 NLRB 233, 235–236 (1989)).

Upon receipt of HBC's December 13, 2017 email, USPOA (through Mr. Richards) was undeniably aware that HBC wanted the union's proposal "ASAP" and that it wanted "to focus on getting this done before the upcoming option year." Mr. Richards knew, or certainly should have known, that the option year start date was the same as the effective date for economic re-openers in Appendix A of the CBA: February 1st. Mr. Richards knew or should have known (given his stated experience in negotiating contracts or economic re-openers with federal government contractors) that the option year on HBC's contract with the Department of the Navy would be exercised by the government sometime prior to February 1, 2018 and that, due to the way in which government contracting works, HBC would be relying on being able to timely submit any wage increase to the government so as to receive reimbursement for that wage increase. Mr. Richards knew or should have known that by waiting so long to provide the union's initial proposal, he was significantly limiting HBC's bargaining space on the

subject of wages, and frustrating much of HBC's ability to offer any wage increase.

It is not clear exactly when Mr. Richards updated his prior belief that HBC's government deadline was December 31, 2017, or precisely what he then believed that deadline to be (and we acknowledge that the application of the Federal Acquisition Regulations to a specific situation is not necessarily a trivial matter); but it is clear that USPOA failed to communicate with HBC or make an initial proposal "ASAP" or even before December 31, 2017, much less before the government actually exercised HBC's option on or about January 17, 2018. This failure of the parties to reach agreement on increased wages in a timely manner was solely caused by USPOA, and the primary excuse offered by Mr. Richards – that he believed that HBC required comparison data to support any potential increase in compensation, and that gathering such evidence was difficult for him – is not supported by any other evidence, and is contradicted by Mr. Cooper's testimony and Mr. Richards's own emails (which, presumably, would have contained at least some mention of such data if it was so important to the process or had been a cause of USPOA's 5 ½-week delay). It also defies common sense to believe that instead of making a timely initial proposal for increased wages (which required nothing more than stating a number higher than the existing wages) and potentially following up with supporting data as quickly as it could be gathered (even if he did believe it was literally "required"), Mr. Richards made an untimely proposal that left HBC with much less room to negotiate, and which contained no supporting data in any event.

USPOA's delay of 5 ½ weeks was of similar length to the 6 ½-week delay alleged against HBC, except that USPOA's delay was while time was of the essence and USPOA's delay was actually prejudicial to the bargaining goal, as well as inexplicable under the circumstances. In contrast, the time HBC spent considering its counterproposal was while any contracting deadlines were many months (and in fact, nearly a year) away, it had no effect on the negotiating space available for either party, and it has been plausibly explained through Mr. Cooper's testimony, as corroborated by his contemporaneous emails to HBC personnel. If it is the case that HBC's delay proves sufficient for bad faith bargaining to be found on the company's part, there is an even stronger case that USPOA's earlier and more consequential delay proves bad faith bargaining on its part; and by application of the principle set forth in Hotel Employees and Restaurant Employees, Local 2, USPOA's bad faith precludes any finding of bad faith against HBC in this matter.

COOPER & MILLER, LLC

By:_____

Brad S. Miller, Esquire
Attorney for Respondent, HBC Management Services, Inc.

Dated: January 22, 2019

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CERTIFICATION OF SERVICE

I hereby certify that a copy of the foregoing Proposed Findings of Fact, Proposed Conclusions of Law, and Legal Brief has been electronically filed with the Division of Judges this date and that copies are also being sent this date via email to Ishun Richards of USPOA at ishun.richards.uspoa@gmail.com; Brendan Keough of the NLRB at Brendan.Keough@nlrb.gov; and courtesy copy to Michael A. Rosas, Administrative Law Judge at Michael.Rosas@nlrb.gov.

COOPER & MILLER, LLC

By:_____
Brad S. Miller, Esquire
Attorney for Respondent, HBC Management Services, Inc.

Dated: January 22, 2019